**UNITED STATES COURT OF APPEALS**
**FOR THE FEDERAL CIRCUIT**

**00-1569, 00-1581 & 00-1582**

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TURTLE ISLAND RESTORATION NETWORK, TODD STEINER, THE AMERICAN SOCIETY FOR THE PREVENTION OF CRUELTY TO ANIMALS, THE HUMANE SOCIETY OF THE UNITED STATES, and THE SIERRA CLUB,

Plaintiffs-Appellants,

v.

NORMAN Y. MINETA, Secretary of Commerce, MADELINE K. ALBRIGHT, Secretary of State, LAWRENCE H. SUMMERS, Secretary of Treasury, DAVID B. SANDALOW, Assistant Secretary of State for the Bureau of Oceans and International Environment and Scientific Affairs, PENELOPE D. DALTON, Assistant Administrator for Fisheries, National Marine Fisheries Services, and ALAN P. LARSON, Under Secretary of State for Economic, Business and Agricultural Affairs,

Defendants-Cross-Appellants,

*and*

NATIONAL FISHERIES INSTITUTE, INC.,

Defendant-Intervenor-Cross Appellant.

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Appeals from the United States Court of International Trade in 98-09-02818, Judge Thomas J. Aquilino, Jr.

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# OPENING BRIEF OF FEDERAL DEFENDANTS-CROSS-APPELLANTS

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## STATEMENT OF RELATED CASES

Pursuant to local rule 47.5 of the Rule of the Federal Circuit Court of Appeals, counsel for the federal Defendants-Cross-Appellants represents that there are no known related cases.

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## STATEMENT OF THE ISSUES

Section 609(b)(1) of the Departments of Commerce, Justice and State, the Judiciary, and Related Agencies Appropriations Act of 1990, Pub. L. No. 101-162, 103 Stat. 988, 1037 (Nov. 21, 1989), prohibits the importation of shrimp or shrimp products "harvested with commercial fishing technology which may affect adversely" endangered or threatened species of sea turtles. Issues arising from this enactment on appeal are:

A. Whether the Guidelines adopted by the State Department to implement this embargo, which supply meaning for the otherwise undefined phrase, "commercial fishing technology which may affect adversely" sea turtle species, appropriately interpret Section 609(b)(1);

B. Whether, despite ruling against the government on the merits, the Court of International Trade had the equitable discretion to deny injunctive relief when (1) the court found no evidence of irreparable harm to sea turtles as a result of the agency interpretation, and the court was not obliged to assume harm, and (2) a similar injunction in an earlier proceeding had contributed to an international dispute, and a second injunction could contribute to further international disruption, prior to this Court's review;

C. Whether the Court of International Trade reasonably denied plaintiffs' request for attorneys' fees pursuant to the Equal Access to Justice Act, 28 U.S.C. 2412, (EAJA), upon finding that the government's position is substantially justified.[1/]

## STATEMENT OF THE CASE

Congress enacted Section 609 to increase the protection of sea turtles in the waters of other nations by embargoing, in Section 609(b)(1), imports of shrimp

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[1/] The Court of International Trade also erred in failing to dismiss this action with regard to the Commerce Department officials, as requested by the government. Defendants' Memorandum in Opposition to Plaintiffs' Notice of Motion and Motion for Summary Judgment or, in the Alternative, Summary Adjudication (Clerk's Record 19) at 42-44. The Commerce Department is mentioned only in Section 609(a), which has been held to be not justiciable, as violative of the separation of powers. Earth Island Institute v. Christopher, 6 F.3d 648, 653 (9th Cir. 1993). Furthermore, in Section 609(a), Congress originally delegated to the State Department, "in consultation with the Secretary of Commerce * * *," the authority to initiate negotiations with other nations to protect sea turtles. Accordingly, under Section 609(a), it is State which takes final agency action; Commerce merely advises. Advice rendered by Commerce is not subject to judicial review. Dalton v. Spector, 511 U.S. 462, 476 (1994).

Moreover, in Section 609(b), Congress delegated the certification responsibilities to the President. Subsequently, the President delegated those responsibilities exclusively to the Secretary of State. Delegation of Authority Regarding Certification of Countries Exporting Shrimp to the United States, 56 Fed. Reg. 357 (Dec. 19, 1990) (see Addendum). No reference is made in Section 609(b) to Commerce. The Commerce Department officials should consequently be dismissed as defendants.

"caught by commercial fishing technology which may affect adversely" species of sea turtles that are protected under U.S. law. Section 609(b)(2) provides that the ban does not apply when the President, acting through the State Department, certifies that a country's government regulates its shrimp fisheries so that the rate of incidental take of sea turtles in that country is comparable to the rate of incidental take in the United States, or that the particular fishing environment of that nation does not pose a threat of incidental taking of sea turtles.

The State Department has issued Guidelines identifying types of shrimp harvesting technology not considered "commercial fishing technology which may affect adversely" sea turtle species, and therefore not subject to the embargo. These Guidelines include State's determination that harvesting shrimp with, *inter alia*, trawl nets equipped with Turtle Excluder Devices (TEDs) does not adversely affect sea turtle species. As a result, TED-caught shrimp is not subject to the Section 609(b)(1) import prohibition

The plaintiffs in this suit challenge the 1998 iteration of the Guidelines. In the decisions on appeal, the CIT declared that the 1998 Guidelines were inconsistent with Section 609. The court held that the United States may not import shrimp harvested with trawl gear from nations which have not first been certified pursuant to Section 609(b)(2). The court refused to enjoin implementation of the regulations,

however, finding that plaintiffs had submitted insufficient evidence of harm to sea turtles. The court also denied plaintiffs' request for attorneys fees.

The government appeals the merits of these determination, and plaintiffs appeal from the denials of injunctive relief and attorneys fees.

## STATEMENT OF THE FACTS

**A. Pertinent Statutory Provisions.** -- Section 609 of the Departments of Commerce, Justice and State, the Judiciary, and Related Agencies Appropriations Act of 1990, Pub. L. No. 101-162, 103 Stat. 988, 1037 (Nov. 21, 1989) (found at 16 U.S.C. 1537 note (1995 Supp.)) (see Addendum) has two subsections. Subsection (a) calls upon the Secretary of State to initiate negotiations with foreign nations to develop treaties to protect sea turtles. Subsection (b) requires limitations on the importation of shrimp as follows:

> (b)(1) **In general**. -- The importation of shrimp or products from shrimp which have been harvested with commercial fishing technology which may affect adversely such species of sea turtles shall be prohibited not later than May 1, 1991, except as provided in paragraph (2).
>
> (2) **Certification procedure**. -- The ban on importation of shrimp or products from shrimp pursuant to paragraph (1) shall not apply if the president shall determine and certify to the Congress not later than May 1, 1991, and annually thereafter that --
>
> (A) the government of the harvesting nation has provided documentary evidence of the adoption of a regulatory program

governing the incidental taking of such sea turtles in the course of such harvesting that is comparable to that of the United States; and

(B) the average rate of that incidental taking by the vessels of the harvesting nation is comparable to the average rate of incidental taking of sea turtles by United States vessels in the course of such harvesting; or

(C) the particular fishing environment of the harvesting nation does not pose a threat of the incidental taking of such sea turtles in the course of such harvesting.

**B. Prior Proceedings. --**

**1. Domestic Regulation and International Requirements. --** As part of a national effort to protect endangered and threatened species of sea turtles, federal regulations have, since 1987, generally mandated that shrimp fishermen install TEDs in their trawl nets when operating in U.S. waters where there is a likelihood of capturing sea turtles. Sea Turtle Conservation; Shrimp Trawling Requirements, 52 Fed. Reg. 24,244 (June 29, 1987).[2/] TEDs are grid-like devices designed to minimize the possibility of mortality to endangered species of sea turtles by allowing them to escape from the shrimp trawl nets. Drawings of TEDs at JA 659-660

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[2/] The five species of sea turtles in question (loggerhead, leatherback, green, hawksbill and Kemp's ridley) are protected as either endangered or threatened species under the Endangered Species Act, 16 U.S.C. 1531-1544; 50 C.F.R. 17.11. Louisiana v. Verity, 853 F.2d 322, 325 (5th Cir. 1988). These same five species are the subject of Section 609(a) and (b). See Section 609(a), referring to Commerce's 1987 regulations.

demonstrate how they work. Domestic shrimpers were initially reluctant to adopt the use of TEDs, fearing that the devices would be costly and ineffective.[3/] All parties now agree, however, that TEDs are not costly and, when used properly, are 97 percent effective at allowing sea turtles to escape from shrimp trawl nets. In 1989, Congress enacted Section 609, placing restrictions on the importation of shrimp harvested in ways that harm sea turtles, including commercial trawl nets not equipped with TEDs.

The Department of State initially interpreted Section 609(b) as applying only to nations of the wider Caribbean region, on the understanding that this was Congress' intent. Beginning in 1991, the State Department annually reviewed nations with shrimp trawl fisheries in the wider Caribbean region for certification under Section 609(b)(2). The Department certified nations if they met either of the statutory standards, *i.e.*, if they had a program to protect sea turtles in the course of shrimp trawl fishing that was comparable to the U.S. program and a comparable incidental take rate (609(b)(2)(A) and (B)), or if they had a fishing environment that did not pose a threat of the incidental taking of sea turtles in the course of such fishing (609(b)(2)(C)).

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[3/] See Louisiana v. Verity, 681 F. Supp. 1178 (E.D. La. 1988), aff'd, 853 F.2d 322 (5th Cir. 1988) (unsuccessful challenge to the 1987 domestic TEDs regulation).

State made these determinations in accordance with implementing Guidelines first issued in 1991 and revised in 1993.[4/] Imports of shrimp harvested in uncertified nations of the wider Caribbean region were prohibited in accordance with Section 609(b)(1). State determined, however, that the import prohibition did not apply to aquaculture shrimp (shrimp farmed and not caught in the wild), since the harvesting of such shrimp does not adversely affect sea turtle species. *Id.* At that time, State had not determined that other methods of shrimp harvesting did not adversely affect sea turtle species.

**2. Earth Island's Initial Suit.** -- The implementation of Section 609 first came before the CIT in 1994, when Earth Island Institute, other environmental groups, and the Georgia Fishermen's Association (collectively, Earth Island) challenged State's certification process and application of Section 609.[5/] The CIT

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[4/] Revised Guidelines for Determining Comparability of Foreign Programs for the Protection of Turtles in Shrimp Trawl Fishing Operations, 58 Fed. Reg. 9015 (February 18, 1993); Notice of Guidelines for Determining Comparability of Foreign Programs for the Protection of Turtles in Shrimp Trawl Fishing Operations, 56 Fed. Reg. 1051 (January 10, 1991).

[5/] Earth Island initially challenged to the government's implementation of Section 609 in federal District Court for the Northern District of California, but the Ninth Circuit held that jurisdiction over the case lay in the CIT, because 28 U.S.C. 1581(i)(3) assigns to that court exclusive jurisdiction over "embargoes or other quantitative restrictions on the importation of merchandise for reasons other than the protection of public health or safety." Earth Island Institute, 6 F.3d at 650-652.

upheld State's determination that a nation's adoption and implementation of a comprehensive TEDs requirement was an adequate basis for certifying that nation as having both a comparable regulatory program and a comparable average rate of incidental take. Earth Island Institute v. Christopher, 913 F. Supp. 559, 578 (CIT 1995) The court also held in the government's favor that the Guidelines did not require APA notice and comment procedure, as claimed by Earth Island. In addition, the court agreed that aquaculture shrimp were not subject to the statute's import prohibition. But the court also held that the import restrictions of Section 609(b) should apply to all nations, not just nations of the wider Caribbean. Consequently, the court directed State to embargo by May 1, 1996, on a global basis, "shrimp or products from shrimp harvested in the wild with commercial fishing technology which may affect adversely" endangered or threatened species of sea turtles. *Id.* at 580. On April 10, 1996, the court rejected a subsequent request by the government that the world-wide embargo be stayed for a year. Earth Island Institute v. Christopher, 922 F. Supp. 616 (CIT 1996). No party appealed.

**3. 1996 Guidelines.** -- In light of the increased international ramifications of Section 609(b), State reviewed its interpretation of Section 609 to assure itself and foreign nations that implementation of the embargo provisions adhered closely to the requirements of Section 609(b) and was not overly broad. In particular, State

reconsidered whether Section 609(b) embargoes all wild-caught shrimp from uncertified countries, or whether there are other categories of shrimp, in addition to aquaculture shrimp, that are harvested in ways or under conditions that do not harm sea turtles. This review did not alter the standards for certifying exceptions to the embargo under Section 609(b)(2). State only reconsidered what categories of shrimp were subject to the embargo in the first instance as having been "harvested with commercial fishing technology that may adversely affect [listed] species of sea turtles."

On April 19, 1996, State issued revised Guidelines which more closely tracked Section 609's language. Revised Notice of Guidelines for Determining Comparability of Foreign Programs for the Protection of Turtles in Shrimp Trawl Fishing Operations, 61 Fed. Reg. 17,342 (April 19, 1996) ("1996 Guidelines"). Recognizing that the Section 609(b)(1) import ban applies only to shrimp or shrimp products harvested using "commercial fishing technology which may affect adversely" listed sea turtles, and that this phrase is not statutorily defined, the 1996 Guidelines determined which shrimp harvesting methods satisfy this standard. Under the 1996 Guidelines, the embargo did not apply to four categories of shrimp and shrimp products: (1) shrimp harvested in an aquaculture facility in which the shrimp spend at least 30 days prior to being harvested ("aquaculture shrimp"); (2)

shrimp harvested by commercial shrimp trawl vessels using TEDs comparable in effectiveness to those required in the United States ("TED-caught shrimp"); (3) shrimp harvested exclusively by means that do not involve the retrieval of fishing nets by mechanical devices or by vessels using gear that, in accordance with the U.S. program described above, would not require TEDs, such as artisanal, or hand-drawn, nets ("artisanal shrimp"); and (4) shrimp harvested in areas in which sea turtles do not occur ("cold-water shrimp"). 61 Fed. Reg. at 17,343. Shrimp captured with other commercial shrimping technology, primarily trawl nets not equipped with TEDs, remained subject to the embargo.

Under the 1996 Guidelines, shipments of shrimp had to be accompanied by a declaration (a "DSP Form 121") that the shrimp in a shipment was "harvested [] under conditions that do not adversely affect sea turtles * * * ." 61 Fed. Reg. at 17,343. Shrimp from a uncertified nation could thus be imported, provided that a government official of that nation signed a DSP-121 and declared that the shrimp fell within one of the harvest categories considered turtle-safe. In addition, all shrimp from a certified country could be imported, without further showing that a particular shipment was caught with technology that did not adversely affect sea turtles.

**4. Post-judgment Proceedings.** -- On June 21, 1996, Earth Island returned to the CIT with a "motion to enforce," challenging the 1996 Guidelines and claiming that Section 609 requires nation-by-nation, rather than shipment-by-shipment, application. Earth Island argued that, unless certified as requiring TEDs on the trawl nets on all of its shrimping vessels, a nation should not be allowed to export any trawled shrimp to the United States. When the court did not immediately rule, Earth Island unilaterally withdrew its motion, expressly reserving the right to challenge the new guidelines in a separate action. Earth Island applied separately for costs and attorneys' fees.

On October 8, 1996, the CIT unexpectedly ruled on the motion to enforce, notwithstanding its withdrawal. The court enjoined the government from importing *any* shrimp or products from shrimp harvested in the wild by vessels of uncertified nations. The court also granted Earth Island's application for fees under the Endangered Species Act, 16 U.S.C. 1531 (ESA). Earth Island Institute v. Christopher, 942 F. Supp. 597 (CIT 1996). The government appealed and sought a stay pending appeal. In denying the stay, the CIT clarified that its injunction did not extend to shipments from uncertified nations of aquaculture, cold-water and artisanal shrimp. Earth Island Institute v. Christopher, 948 F. Supp. 1062 (CIT

1996). State thus remained enjoined from allowing the importation of TED-caught shrimp from uncertified nations.

**5. Federal Circuit's 1998 Decision.** -- On June 4, 1998, a panel of this Court reversed, finding that the CIT was without jurisdiction to rule on the motion to enforce once the motion had been withdrawn. The Court did not address the merits but did reverse the award of fees under the ESA. Earth Island Institute v. Albright, 147 F.3d 1352, 1357 (Fed. Cir. 1998) ("even hypothetically assuming that section 609 falls within the ESA, Earth Island's claim still could not qualify for fees and costs under these provisions."). The Court vacated the CIT's orders of October 8 and November 25, 1996, thus lifting the injunction prohibiting importation of TED-caught shrimp from uncertified nations, and remanded for a determination of whether to award fees under EAJA. The parties agreed on fees and this initial action concluded.

**C. 1998 Guidelines.** -- On August 28, 1998, State issued revised Guidelines implementing Section 609. See Addendum. These 1998 Guidelines reinstituted the importation of TED-caught shrimp from uncertified nations. Revised Notice of Guidelines for Determining Comparability of Foreign Programs for the Protection of Sea Turtles in Shrimp Trawl Fishing Operations, 63 Fed. Reg. 46094, 46095 (1998) ("the harvesting of shrimp with TEDs does not adversely affect sea turtle species

and * * * TED-caught shrimp is * * * not subject to the import prohibition created by Section 609(b)(1)."). As in the 1996 Guidelines, the 1998 Guidelines identified four categories of shrimp and shrimp products not subject to the embargo: (1) - aquaculture shrimp; (2) TED-caught shrimp; (3) artisanal shrimp; and (4) cold-water shrimp. The 1998 Guidelines also provided similar mechanisms for determining comparability and providing the basis for certification of nations. *Id.* at 46096. State deemed the 1998 Guidelines to represent the best balance among competing interests: consistency with the statutory language; consistency with the "Department's policy of using trade restrictions precisely, not in an overbroad manner," and consistency with the policy of encouraging individual shrimp harvesters to use TEDs:

> Once such harvesters become familiar with the advantages of using TEDs, [FN 2] we believe that skepticism in foreign nations about TEDs technology will lessen and the number of country-wide TEDs programs may increase.
>
> [FN2] In addition to allowing sea turtles to escape from shrimp trawl nets, TEDs also direct other large, unwanted debris out of such nets, thus increasing the efficiency of the trawling operation and reducing fuel costs.

JA 106-7.

In addition to allowing the importation of TED-caught shrimp from uncertified nations, the 1998 Guidelines addressed concerns raised by interested

parties (including plaintiffs) and other governmental agencies about the Guidelines' effect on the conservation of sea turtle species, and established additional conditions and incentives to implement State's determination that TED-caught shrimp is not subject to the import prohibition.

First, in response to a concern that foreign harvesters might fraudulently claim that shrimp has been harvested with TEDs, State indicated that it will "undertak[e] regular examinations of the procedures that governments of uncertified nations have put in place for verifying the accurate completion of the DSP-121 forms." *Id.* If these examinations reveal that a government does not have adequate procedures in place, State will instruct the Customs Service not to permit the importation of TED-caught shrimp harvested in that nation. *Id.*

Second, in response to concerns that (1) foreign nations that have established regulatory programs comparable to the United States' program might abandon or limit those programs so that only shrimp exported to the United States will be TED-caught; and (2) nations that otherwise would consider adopting a comparable regulatory program might instead adopt a policy of using TEDs only on vessels harvesting shrimp for export to the United States, State reviewed the available evidence and concluded that it did not indicate that permitting the importation of TED-caught shrimp causes countries to abandon or fail to adopt regulatory

programs. Nonetheless, State indicated that it would review the effects of its decision every six months for a three-year period beginning May 1, 1999. If these reviews reveal evidence that the agency's decision adversely affects sea turtle species, State noted that it would reassess its decision. State also noted that it would increase its efforts to protect and conserve sea turtles through the negotiation and implementation of multilateral agreements: "[a]s a matter of policy, the Department of State is of the view that foreign governments should require TEDs to be used on shrimp trawl vessels wherever there is a likelihood of intercepting sea turtles." *Id.*

**D. History of Certifications.** -- Prior to the publication of the 1996 Guidelines, only nations of the Wider Caribbean applied for and received certification, consistent with State's application of Section 609 to that geographical area only.[6/] Fourteen nations were potentially affected (56 Fed. Reg. at 1051), although the number of nations actually certified varied each year.

Four additional nations implemented comparable, nationwide regulatory programs and applied for and received certification during the five-month period

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6/ See Notice of Guidelines for Determining Comparability of Foreign Programs for the Protection of Turtles in Shrimp Trawl Fishing Operations, 56 Fed. Reg. 1051 (January 10, 1991) (defining Wider Caribbean Region).

when the 1996 Guidelines -- embargoing shipments of shrimp harvested with potentially harmful technology -- were in effect (from their effective date of May 1, 1996, through October 8, 1996, when the CIT enjoined their implementation). These four were Costa Rica, Ecuador, El Salvador, and Guatemala, which State identified on May 17, 1996, as among thirteen countries certified as having adopted programs to reduce the incidental capture of sea turtles in shrimp fisheries comparable to the program in effect in the United States. 61 Fed. Reg. 24998, 24999 (May 17, 1996).[7/] In August 1996, State also recertified Honduras as having a comparable program. 61 Fed. Reg. 43395 (August 22, 1996). Of the fourteen countries certified in this period, two were major shrimp exporting countries outside the wider Caribbean (Ecuador and Indonesia) that had not previously been subject to the Act. Thailand subsequently instituted a certifiable program prior to the October 8, 1996, order (although Thailand's actual date of certification occurred in the next month). 61 Fed. Reg. 59482 (November 22, 1996). Four of the countries

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7/ State also certified 15 nations that have shrimp fisheries in cold waters, in which the risk of taking sea turtles is negligible, and 8 nations that harvest shrimp using only fishing gear which does not pose a threat of incidental drowning of sea turtles. 61 Fed. Reg. at 24999. In its subsequent yearly certifications, State has regularly certified these two classes of nations. The numbers of nations in each category has varied slightly, as various nations begin and stop shrimp harvesting in cold waters or by artisanal means. See, *e.g.*, JA 917-9 (16 cold-water nations; 9 artisanal nations).

previously certified (Colombia, Mexico, Nicaragua and Panama) as having comparable programs within the wider Caribbean elected to remain certified by extending their existing programs to cover their Pacific coasts for the first time. 61 Fed. Reg. at 24999.

As summarized in the 1998 Guidelines, during this period of time when the United States permitted the importation of TEDs-caught shrimp from uncertified nations, (1) "no foreign nation that had established such a program abandoned or limited its program"; and (2) "some Central American nations *expanded* their TEDs programs during that time to include their Pacific as well as Caribbean coasts." 63 Fed. Reg. at 46095 (emphasis added).

By contrast, during the 22-month period when the CIT's prohibition on importing shrimp from any uncertified nation was in effect,[8/] only two new countries, China and Nigeria, applied for and became certified for the first time. 61 Fed. Reg. 4826 (January 31, 1997). China was certified due to its use of fishing gear that does not harm sea turtles, however, and Nigeria, which was certified as having adopted a comparable TEDs program, had never expressed any interest in foregoing such a program in favor of exporting individual shipments of TED-caught

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[8/] From October 8, 1996, through August 28, 1998, when the 1998 Guidelines issued.

shrimp. Brazil also was recertified. 62Fed. Reg. 19157 (April 18, 1997). Nigeria, Brazil and Venezuela subsequently lost certification in May 1998, still during the period when the CIT's broader embargo against uncertified nations was in effect. 63 Fed. Reg. 30550.[2/]

Since the 1998 Guidelines reinstituted the policy of permitting the import of TED-caught shrimp from uncertified nations, the number of nations certified as having comparable regulatory programs governing the incidental taking of sea turtles has grown. In May 1999, State certified 14 countries: Belize, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Honduras, Indonesia, Mexico, Nicaragua, Nigeria, Panama, Thailand and Venezuela. JA 819-823. Guyana was certified in June 1999. JA 824-825. In May 2000, 16 countries were so certified. JA 918-919. Pakistan was certified in July 2000.

Significantly, only two uncertified nations, Brazil and Australia, have ever sought to export TED-caught shrimp to the United States. JA 920-925. Although Brazil has been certified at times in the past, both countries are uncertified as of the date of this brief. Since April 2000, Australia has required TEDs throughout its

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[2/] Venezuela and Nigeria were eventually recertified in August, 1998. 63 Fed. Reg. 44499 (August 19, 1998).

fleet in its large Northern Prawn Fishery, although other Australian shrimp fisheries do not have a similar requirement. See *infra* at 45-6.

**E. Current Litigation.** -- Several environmental groups, including Earth Island (now Turtle Island Restoration Network or TIRN) challenged the 1998 Guidelines, suing again in the CIT to enjoin the importation of TED-caught shrimp from uncertified nations. The National Fisheries Institute (NFI) again intervened on behalf of the federal government. Clerk's Record (CR) 8. State filed the administrative record underlying the 1998 regulations on October 1, 1998. JA 81-184. The parties cross-moved for summary judgment. CR 17, 19, 20.

On April 2, 1999, the CIT ruled against the government in Earth Island Institute v. Daley, 48 F. Supp. 2d 1064 (CIT 1999). The court held that the 1998 Guidelines, like the 1996 Guidelines, violated Section 609 by permitting the import of TED-caught shrimp products from uncertified nations. The CIT reiterated the conclusion from its vacated decision October 8, 1996, that "paragraph (1) of section 609(b) is specifically contingent upon the certification procedure established by section 609(b)(2), which offers the only congressionally-approved breaches of the embargo * * * ." The court reasoned that "[p]aragraphs (b)(1) and (b)(2) are pari materia; they cannot be read independently, or out of the context adopted by Congress, including section 609(a), to slow or stanch the extinction of species of sea

turtles." The court ruled that, "so long as the 1998 Revised Guidelines report that the 'foundation of the U.S. Program' continues, with 'limited exceptions,' to be that 'all other commercial shrimp trawl vessels operating in waters subject to U.S. jurisdiction in which there is a likelihood of intercepting sea turtles must use TEDs at all times,' the catch of vessels equipped with TEDs from nations without such comparable foundation continues to be subject to embargo." 48 F. Supp. 2d at 1081. The CIT did not enter final judgment, however; the CIT instead ordered State to provide evidence of its enforcement of Section 609, including, *inter alia,* a copy of the Department's 1999 annual report to Congress under Section 609(b)(2) regarding the certification status of various nations.

In July 1999, State provided the CIT with the requested documentation, and NFI responded as well. JA 769-914. In January 2000, Earth Island filed a status report requesting court action. CIT Docket Sheet No. 29. On April 4, 2000, the CIT requested State to provide a copy of the 2000 annual report and the parties filed additional responses on May 4, 2000. JA 915-932. Earth Island also moved for attorneys fees. JA 949-1050.

On July 19, 2000, the CIT issued another ruling and entered final judgment. Turtle Island Restoration Network v. Mallet, 110 F. Supp. 2d 1005 (CIT 2000) (the style of the case changed when the court granted plaintiffs' request to replace the

lead plaintiffs and substituted the then-current government official). Ruling on the motion for a final judgment and for attorneys' fees, the court entered declaratory judgment for TIRN, reiterating its April 2, 1999, determination that the 1998 Guidelines violate Section 609. The CIT denied TIRN's request for injunctive relief, however, ruling that TIRN had not carried its burden of demonstrating harm to sea turtles attributable to the 1998 Guidelines. Apparently of especial importance to the court were the implications of its ruling with respect to the dispute settlement proceedings in the WTO. (see *infra* Section F). "In sum, while the plaintiffs have persuaded this court to grant declaratory relief, they have not borne their burden with regard to any of the other relief for which they pray." *Id.* at 1020.

The CIT also denied TIRN's application for attorneys' fees under EAJA, ruling that, although TIRN was a prevailing party, the government's position was substantially justified. *Id.* at 1020.

F. **International Dispute**. -- In 1996, during that period when State was enjoined by the CIT from allowing the import of TED-caught shrimp from uncertified nations, the United States' implementation of Section 609 was the subject of a complaint brought before the World Trade Organization (WTO) by India, Pakistan, Malaysia and Thailand. A dispute settlement panel was established to resolve the dispute. In its May 15, 1998, report, the panel concluded that the

import ban on shrimp and shrimp products stemming from Section 609 was inconsistent with the United States' obligation under the General Agreement on Tariffs and Trade 1994 (GATT 1994) and could not be otherwise justified, pursuant to GATT's exceptions, as a measure to protect natural resources. The United States appealed to the WTO Appellate Body.

On October 12, 1998,[10/] the Appellate Body of the WTO issued its report, agreeing with the United States that Section 609 is covered by an exception to GATT rules for measures relating to conservation of exhaustible natural resources, but finding that certain aspects of the *application* of Section 609 amounted to unjustifiable discrimination under GATT. The Appellate Body faulted the application of the import restriction to TED-caught shrimp from uncertified countries as contributing to its findings of unjustifiable discrimination. The Appellate Body held that such an embargo unfairly excluded "shrimp caught using methods identical to those employed in the United States * * * simply because they have been caught in waters of countries that have not been certified by the United

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10/ As noted, the WTO proceeding was initiated while the federal government was enjoined from permitting imports of TED-caught shrimp from uncertified nations. This Court vacated that injunction on June 4, 1998, after the initial WTO panel ruling but before the WTO Appellate Body ruled. Although the government then returned to implementation of the 1998 Guidelines, the Appellate Body could not consider this new information since it was not before the initial WTO panel.

States." United States – Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/AB/R, at ¶ 175 (Oct. 12, 1998), 1998 WL 720123 (W.T.O.). The Appellate Body also found that the United States had discriminated in the level of technical assistance provided to Asian nations as compared to the level provided to nations in the wider Caribbean, and faulted the Guidelines for not recognizing turtle-safe shrimping methods that might differ from the United State's TEDs program. The report recommended, *inter alia*, that (1) in making its certification determinations, State should be more flexible in determining what constitutes a comparable program for the protection of sea turtles in the course of shrimp trawl fishing; (2) the certification process should provide for greater process and notification to foreign countries of the reasons for making certification decisions; and (3) the United States should address the unjustifiable discrimination caused by excluding shrimp caught using methods identical to those employed in the United States solely because they had been caught in waters of uncertified nations. The WTO Dispute Settlement Body adopted the Appellate Body report in November 1998, and recommended that the United States bring its import restrictions under Section 609 into conformity with U.S. obligations under the WTO Agreement.

On July 8, 1999, in response to the recommendations of the Dispute Settlement Body, State again revised the Guidelines. Revised Guidelines for the

Implementation of Section 609 of Public Law 101-162 Relating to the Protection of Sea Turtles in Shrimp Trawl Fishing Operations, 64 Fed. Reg. 36946 (July 8, 1999). JA 826-846. The 1999 revisions retained the policy permitting importation of TED-caught shrimp from uncertified nations, among other categories of shrimp caught with technology that does not adversely affect sea turtles. JA 828. The 1999 Guidelines instituted procedural changes in State's certification process, in order to create a more transparent and predictable process for reviewing foreign programs. The revisions ensure that the governments of harvesting nations will be notified on a timely basis of all decisions and provided an opportunity to be heard and to present any additional information relevant to the certification decision. Harvesting nations not granted a certification are to receive a full explanation why certification was denied. The 1999 Guidelines require State to specify the steps that the government must take to receive a certification in the future. 64 Fed. Reg. 14,481 (March 25, 1999); 64 Fed. Reg. 36,946 (July 8, 1999).

Malaysia, one of the four original complainants, subsequently returned to the WTO to challenge the United States' compliance with the Final Report. The Dispute Settlement Body reestablished the original panel to hear Malaysia's complaint. One of Malaysia's main arguments is that the United States cannot be in compliance unless the embargo is not extended to TED-caught shrimp imported

from uncertified nations. Malaysia also argues that the recent CIT decision invalidating the 1998 Guidelines indicates that the United States will continue to embargo all shrimp products from uncertified nations, and thus that the United States cannot be found to be in compliance. The United States has responded that importing TED-caught shrimp from uncertified countries fully addresses the Appellate Body finding indicating that the United States should not exclude shrimp caught using methods identical to those employed in the United States simply because they were caught in waters of uncertified nations, and that this policy remains in effect at least pending appellate review. As of the date of filing of this brief, the proceeding has been briefed and argued but the WTO has not yet issued a report.[11/]

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11/ Because this WTO proceeding is ongoing, the pleadings are not in the CIT's record. Should the court request any referenced pleadings, the government would provide the publically available copies.

## SUMMARY OF ARGUMENT

1. In declaring that the 1998 Guidelines violate Section 609, the CIT has erred, as a matter of law, in broadening the scope of the embargo enacted by Congress in Section 609(b)(1). Focusing almost exclusively on that portion of the enactment which allows nations to avoid the embargo by obtaining certification, the court fails to recognize that shrimp caught by methods which do not adversely affect sea turtles is simply not subject to any embargo in the first instance, and the exemption provided by the Section 609(b)(2) certification process is not applicable. The CIT's interpretation thus turns the plain language of the statute on its head and preempts Congress' role in fashioning specific embargoes, particularly important in the sensitive area of international relations. By contrast, the 1998 Guidelines comply with the plain meaning of Section 609(b)(1) by barring "[t]he importation of shrimp or products from shrimp which have been harvested with commercial fishing technology which may affect adversely [listed] species of sea turtles."

The CIT also fails to accord appropriate deference to State's interpretation of the undefined statutory term, "commercial fishing technology which may affect adversely" sea turtle species. State has reasonably interpreted this phrase to include trawl nets equipped with TEDS that are comparable in effectiveness to those required in the United States. Any shrimp thus caught are simply not subject to

embargo and may be imported into this country. By contrast, shipments of shrimp harvested using commercial fishing technology that does adversely affect sea turtles (or unaccompanied by the requisite documentation) are embargoed.

The CIT's decisions affect not only the importation of shrimp but also the United States' defense of its application of Section 609 in proceedings before the WTO. The report of the WTO Appellate Body specifically noted that the requirement that the United States accept shrimp products only from certified nations contributed to the Appellate Body's finding of unjustifiable discrimination. As a result of this Court's earlier decision, the United States was subsequently able to return to its practice of allowing imports of TED-caught shrimp from uncertified nations. If, pursuant to the CIT's most recent decisions, this country is again prevented from accepting TED-caught shrimp from uncertified nations, the complaining country in the WTO proceeding can be expected to argue that the United States is not applying Section 609 in compliance with U.S. international obligations. It is well-established that "an act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains * * *." Murray v. The Schooner Charming Betsy, 6 U.S. (2 Cranch.) 64, 118, 2 L.Ed. 208 (1804). Accordingly, the government's interpretation of Section 609 is also entitled to deference under the Charming Betsy doctrine.

2. TIRN mistakenly claims that the CIT was obliged to halt the importation of TED-caught shrimp, once the court had concluded that Section 609 does not permit this practice. To the contrary, in light of the paucity of evidence presented by TIRN as to irreparable injury from the embargo, the court was not required, as an equitable matter, to issue an injunction. Nor was the CIT required, as a legal matter, to enjoin the government. In fact, the CIT refrained from contributing further to the international controversy by changing the scope of the embargo for a *third* time, when a WTO challenge is ongoing and appellate review by this Court was likely. If this Court rules in the government's favor on the interpretation of Section 609, the Court need not reach the issue of remedy.

3. The government was substantially justified in its interpretation of Section 609 and the CIT consequently did not abuse its discretion in denying TIRN's request for attorneys fees. Under EAJA, fees are not automatically awarded, and the statute must be strictly construed in favor of the government. This Court has held that fees may not be awarded simply because the government has lost; where, as here, the government was substantially justified, fees are properly denied.

## ARGUMENT

## I

## THE CIT ERRED IN ITS INTERPRETATION OF SECTION 609

The CIT's decisions do violence to the plain language of Section 609(b), undermine Congress' carefully sculpted statutory scheme, and fail to defer to the administering agency's interpretation of specific language left undefined in the statute. The CIT reflects confusion as to the two-step analytical process embodied in the structure of Section 609, while the Guidelines closely follow the language of the statute. Because, as explained below, the CIT appears to assume that all but aquaculture, artisanal and cold water shrimp are embargoed unless otherwise exempted, the decision below is incorrect and embargoes shrimp that should, in fact, be able to be imported into this country. The CIT's interpretation of Section 609 is reviewable *de novo*. Rosete v. OPM, 48 F.3d 514, 517 (Fed. Cir. 1995).

**A. The CIT Fails to Give Effect to the Plain Language of Section 609(b)(1).** -- Section 609(b) requires a two-part analysis. Section 609(b)(1), entitled "In General," prohibits the import only of shrimp and products from shrimp "harvested with commercial fishing technology which may affect adversely [listed] species of sea turtles." No other shrimp are subject to the embargo. Specifically, the embargo provision provides:

> The importation of *shrimp or products of shrimp which have been harvested with commercial fishing technology which may affect adversely such species of sea turtles* shall be prohibited not later than May 1, 1991, except as provided in paragraph (2).

Section 609(b)(1)(emphasis added). The ban on shrimp harvested in such manner may be avoided, however, by nations meeting the certification requirements of Section 609(b)(2), which requires either a comparable regulatory program and a comparable rate of take of listed turtles or a shrimp fishing environment that is safe for sea turtles. Thus, as the 1998 Guidelines interpret the statute, the first inquiry under Section 609(b)(1) is whether the shrimp to be imported was harvested with "commercial fishing technology which may affect adversely" listed species of sea turtles. Unless this question is answered in the affirmative, the prohibition simply does not apply. Consequently, if it can be demonstrated to the satisfaction of the U.S. that shrimp has been harvested with technology that does not adversely affect sea turtles, *e.g.*, hand nets or nets equipped with TEDs, then there is no need to proceed further in the statute to determine whether the country from which the shrimp is imported has been certified. Section 609 consequently does not compel State to establish country-wide embargoes against shrimp from uncertified countries.

Since the statute does not define the potentially harmful technologies covered by the embargo, the Guidelines make the appropriate identification. The 1998 Guidelines identified four types of shrimp products not subject to embargo: aquaculture, TED-caught, artisanal and cold-water shrimp. This determination -- that shrimp harvested under certain conditions that do not adversely affect sea turtles is not subject to embargo -- is thus squarely rooted in the language of Section 609.

The CIT, however, assumes that all commercial fishing technologies employed in the wild in waters where there is a likelihood of intercepting sea turtles may adversely affect sea turtles, and ignores both the statute's qualifying language and the government's interpretation of the qualifying language. The order focuses on the fact that Section 609(b)(1) "is specifically contingent upon the certification procedure established by section 609(b)(2), which offers the only congressionally-approved breaches of the embargo * * *." 48 F. Supp. 2d 1081.

In rejecting State's Guidelines, the CIT relies on the provisions of Section 609(a) and Section 609(b)(2), directed at nations, to conclude that an embargo must be directed at entire nations, rather than categories of shrimp, and thus fails to give any effect to the qualifying language of Section 609(b)(1). TIRN itself describes the CIT's recent decisions as holding "that the law prohibits the importation of shrimp,

*no matter how they are harvested*, from nations that are not certified * * *."[12/] But by its plain language, Section 609(b)(1) does not embargo "nations," but rather shrimp caught under certain conditions. By placing its focus on the certification requirements of 609(b)(2), the CIT reads out of the statute the requirement that a decision must first be made under 609(b)(1) as to whether the shrimp were harvested with potentially harmful technology.[13/] If Congress had intended to mandate certification under Section 609(b)(2) prior to allowing any shrimp from a given nation into the United States, it would not have included the modifier "harvested with commercial fishing technologies which may adversely affect [listed] species of sea turtles" when referring to shrimp in Section 609(b)(1).

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[12/] Page 8 of Brief of *Amici Curiae*, filed in the WTO proceeding on November 12, 2000, by, *inter alia*, TIRN and two other plaintiffs in the instant litigation.

[13/] See United States v. Nordic Village, Inc. 503 U.S. 30, 36 (1992)(it is a "settled rule that a statute must, if possible be construed in such fashion that every word has some operative effect"); Colautti v. Franklin, 439 U.S. 379, 392 (1979)(it is an "elementary canon of construction that a statute should be interpreted so as not to render one part inoperative"); cited in Genentech v. Eli Lilly & Co., 998 F.2d 931, 942 (Fed. Cir. 1993), cert. denied, 510 U.S. 1140 (1994); O-M Bread, Inc. v. U.S. Olympic Committee, 65 F.3d 933, 937 (Fed. Cir. 1995).

**B. <u>The CIT's Decision Inappropriately Jettisons Congress' Choices Concerning Appropriate Trade Legislation</u>.** -- Underlying the CIT's interpretation is a perceived congressional intent to place on shrimp harvesters in foreign waters requirements "comparable" to those on domestic shrimpers.[14/] But not only is this deduction at odds with the statute's plain language, it is also contradicted in the legislative history. By focusing on the comparability requirements of Section 609(b)(2), to the exclusion of the actual statutory structure of Section 609(b) as a whole, the CIT usurps Congress' role in shaping appropriate trade legislation. The CIT seems to consider that allowing the importation of TED-caught shrimp from uncertified countries means that the State Department is requiring something less than is comparable to the U.S. program. See also 942 F. Supp. at 605. While the thrust of Section 609(b) *as a whole* is to encourage other

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14/ See, *e.g.*, 48 F. Supp. 2d at 1081; 110 F. Supp. 2d at 1010 (footnotes omitted):

> So long as the 1998 Revised Guidelines report that the "foundation of the U.S. program" continues, with "limited exceptions", to be that "all other commercial shrimp trawl vessels operating in waters subject to U.S. jurisdiction in which there is a likelihood of intercepting sea turtles must use TEDs at all times", the catch of vessels equipped with TEDs from nations without such comparable foundation continues subject to embargo.

nations to adopt comparable turtle protection regimes, Congress did not impose as broad a trade embargo as the CIT would have it.

Congress has not implemented the broader import prohibitions that it knows full well how to draft.[15/] Where, as here, Congress adopts legislation directed very specifically to shrimp harvested only with potentially harmful technology, and has chosen to vest in the Executive Branch the discretion to determine which products are not so harvested, the court should respect both the Congressional choice and the judgment made by the administering agency.

This case thus presents an issue much like that before the Supreme Court in Japan Whaling Ass'n v. American Cetacean Soc., 478 U.S. 221 (1986). In Japan Whaling Ass'n, the Supreme Court reversed a ruling that, under the Pelly Amendment to the Fishermen's Protective Act of 1967, 85 Stat. 786, as amended, 22 U.S.C. 1978, and the Packwood Amendment to the Magnuson Fishery Conservation and Management Act, 16 U.S.C. 1801, the Secretary of Commerce

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15/ The narrow scope of the embargo contained in Section 609(b)(1) stands in marked contrast to other environmental statutes that include measures affecting international trade. See, *e.g.*, Pelly Amendment to the Fishermen's Protective Act, 16 U.S.C. 1826a(b)(4)(A),(B) (providing President discretion to restrict imports of any products of nation deemed to be diminishing effectiveness of international environmental agreements); High Seas Driftnet Fisheries Enforcement Act, 16 U.S.C. 1826a(b)(1)(B) (prohibiting all importation of fish, fish products and sport-fishing equipment of nations identified as engaging in high seas driftnet fishing).

was required to certify to the President that Japan was in violation of a sperm whale quota established by the International Whaling Commission (IWC), operating pursuant to the International Convention for the Regulation of Whaling (ICRW). The Secretary had declined to so certify, choosing instead to pursue a bilateral agreement with Japan that would phase in Japanese compliance with the quota. The Court found that the Pelly and Packwood Amendments did not require certification of Japan for refusing to abide by the IWC's whaling quotas, unless and until the Secretary had made a determination that Japanese nationals were conducting fishing operations which would "diminish the effectiveness" of the ICRW. Although the Secretary was required by statute to make a "prompt" certification if he concluded that Japan's actions actually "diminish the effectiveness," there was no statutory definition of the "diminish" phrase or any other language specifying the factors that the Secretary should consider in making that determination. The language of Section 609(b) is significantly less imperative than the language at issue in Japan Whaling Association (see 478 U.S. at 226), and more clearly vests the Secretary of State with the authority to determine which shrimping technologies do not adversely affect sea turtles species.

Moreover, both statutes require that the Executive Branch observe the delicate balance between Congress' legislative imperatives and international

relations. Since the determination in Japan Whaling was entrusted to the Secretary of Commerce alone (*id.* at 232), the Court held (*id.* at 241) that the

> Secretary's decision to secure the certainty of Japan's future compliance with the IWC's program through the 1984 executive agreement, rather than rely on the possibility that certification and imposition of economic sanctions would produce the same or better result, is a reasonable construction of the Pelly and Packwood Amendments.

Similarly, Section 609(a) calls upon State to further the goals of encouraging multilateral agreements to protect turtles. While State may not, of course, allow the import of any shrimp caught with potentially harmful commercial technology, it is imperative that, in light of the goal of international cooperation embodied in Section 609(a) (not to mention the proceedings currently pending before the WTO), the courts not increase the Congressionally-mandated prohibitions on importation of shrimp. Congress has narrowly tailored the statute to further the international concern of protecting imperiled sea turtles.

The limited legislative history supports a reading that Section 609 delegated to the administering agency the task of determining what categories of shrimp should be embargoed. As Senator Breaux, the bill's sponsors, noted in the contemporaneous Senate debate, it would be up to State in implementing the Act to "identify * * * precisely what sort of commercial fishing operations meet this test."

135 Cong. Rec. S. 8734 (daily ed., July 20, 1989). There is also legislative history indicating an understanding by individual members of Congress that Section 609 would serve to encourage other nations to adopt comparable methods of conserving sea turtles. See, *e.g.*, 135 Cong. Rec. S 8335, 8377 (Daily ed. July 20, 1989) (Sen. Breaux: "this amendment focuses on the role that other nations must play if we are to fulfill our goal of effective sea turtle conservation."). In keeping with these statements, the Guidelines reflect State's judgment how best to implement the statutory embargo and also to encourage nations to adopt comparable programs.

The legislative history cited by the CIT as critical of the agency's interpretation is the statement of an individual Congressman, made more than ten years *after* the enactment of Section 609. 48 F. Supp. 2d at 1081, n.34. Courts commonly consider such post-enactment statements irrelevant in interpreting a statute or determining legislative intent. Weinberger v. Rossi, 456 U.S. 25, 35-36 (1982). "[P]ost-passage remarks of legislators, however explicit, cannot serve to change the legislative intent of Congress expressed before the Act's passage. * * * Such statements 'represent only the personal views of these legislators, since the statements were [made] after passage of the Act;'" see also Sullivan v. Finkelstein, 496 U.S. 617, 632 (1990) (Scalia, J., concurring in part)("In my opinion, the views

of a legislator concerning a statute already enacted are entitled to no more weight that the views of a judge concerning a statute not yet passed.").

C. **The Court's Orders Fail to Defer to the Agency's Interpretation of a Phrase Not Defined by Congress.** -- In rejecting the approach taken in the 1998 Guidelines, the CIT failed to defer to the government's interpretation of Section 609(b)(1). Congress did not define the Section 609(b)(1) phrase "harvested with commercial fishing technology which may affect * * * sea turtles." This is precisely the kind of question at issue in Japan Whaling Association, and determined by the Supreme Court to have been entrusted to the administrating agency: "if a statute is silent or ambiguous with respect to the question at issue, our longstanding practice is to defer to the 'executive department's construction of a statutory scheme it is entrusted to administer' * * * unless the legislative history of the enactment shows with sufficient clarity that the agency construction is contrary to the will of Congress." 478 U.S. at 233, citing Chevron, Inc. v. NRDC, 467 U.S. 837, 844 (1984); see also Am. Ass'n of Exps. And Imps.-Textile & Apparel Group v. United States, 751 F.2d 1239, 1247 (Fed. Cir. 1985) (stating that, in the international field, "congressional delegations are normally given broad construction"). The State

Department, charged with the administration of this statute, is entitled to a considerable amount of deference in its interpretation.[16/]

State's interpretation is, moreover, rational and well-considered. The 1998 Guidelines determine that the import prohibitions of Section 609(b)(1) do not extend to shrimp harvested in any of four specific conditions that do not adversely affect sea turtles. Two of these (aquaculture and cold-water shrimp) do not result in the incidental death of sea turtles and the CIT has so recognized. The other two (TED-caught shrimp and shrimp caught by artisanal and other non-harmful methods) occur in a manner that is consistent with the United States' domestic requirements (shrimp caught with TEDs comparable to those used in the United States) or domestic exclusions (shrimp harvested using hand-retrieved nets or other non-harmful means). The CIT effectively concludes that artisanal shrimp were properly determined by State not to be subject to embargo. By thus allowing some exemptions from a nation-wide embargo but not others, the CIT's interpretation is internally inconsistent. State's determination that TED-caught shrimp does not adversely

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[16/] Chevron, *supra*, at 843; Rust v. Sullivan, 500 U.S. 173, 184 (1991); Martin v. Occupational Safety & Health Review Comm'n, 499 U.S. 144, 150 (1991); accord, Christensen v. Harris County, 529 U.S. 576 (2000).

affect sea turtles species is both more consistent and more reasonable and therefore entitled to deference.

**D. The State Department's Interpretation, Unlike the CIT's, Minimizes Potential Conflict with International Law.**-- The CIT-imposed import prohibition on TED-caught shrimp from uncertified nations contributed to the WTO Appellate Body's finding the United States' implementation of Section 609 violated obligations under GATT. In particular, the WTO Appellate Body found that there appears to be no adequate justification for the United States to embargo shrimp caught with turtle-safe technology equivalent in effectiveness to that required and used in this country. Reimposition of the embargo on TED-caught shrimp from uncertified countries could be used by the complaining country in the WTO proceeding to argue that the United States is not applying Section 609 in compliance with U.S. international obligations. The CIT's interpretation could again contribute to a finding that the United States was in violation of its international obligations; by contrast, State's interpretation, which minimizes that potential, best implements Section 609.

It is an elementary principle of statutory construction that "an act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains * * *." Murray v. Schooner Charming Betsy, 6 U.S. (2

Cranch) 64, 118 (1804); accord, Federal Mogul Corp. v. United States, 63 F.3d 1572, 1581-82 (Fed. Cir. 1995). While international obligations cannot override inconsistent requirements of domestic law, "ambiguous statutory provisions * * * [should] be construed, where possible, to be consistent with international obligations of the United States." Footwear Distributors and Retailers of America v. United States, 852 F. Supp. 1078, 1088 (CIT), appeal dismissed, 43 F.3d 1486 (Fed. Cir. 1994), citing DeBartolo Corp. v. Florida Gulf Coast Building and Trades Council, 485 U.S. 568 (1988). These longstanding principles of statutory construction support the government's interpretation of the scope of Section 609(b)(1) .

Furthermore, where legislation affects international relations, this Court is especially deferential to the Executive Branch's interpretation of its statutory obligations. As the Court recently held, "in cases in which international relations are concerned, the President plays a dominant role. In these matters, it is generally assumed that Congress does not set out to tie the President's hands; if it wishes to, it must say so in clear language." Humane Society v. Clinton, __ F.3d __, 2001 WL 8790 at *10 (Fed. Cir. Jan. 4, 2001); see also United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304, 320 (1936). Accordingly, the CIT should have deferred to the government's interpretation of the scope of Section 609(b)(1) which fulfills its

charge to construe domestic statutes, to the extent possible, so as not to create inconsistencies with U.S. international obligations.

**E. The Court Improperly Engaged in Policy Making and Ignored Evidence Before it.** -- The CIT's reasoning was also based upon its conclusion that the government must implement Section 609(b) so as to force nations to adopt TEDs programs fully before allowing shrimp imports into this country. Not only is the propriety of the court's efforts to shape the policy of international affairs questionable,[17] the court disregarded the evidence before it. TIRN continues to claim (Br. 44) that allowing an exception to the embargo for TED-caught shrimp would remove all incentive from foreign nations to adopt TEDs programs, although, as the CIT noted, they have failed to provide any persuasive evidence in support of this assertion. 110 F. Supp. 2d at 1020. The federal and private defendants, by contrast, provided evidence that refutes this argument.

The facts demonstrate that the government's interpretation has effectively encouraged nations to adopt nationwide TEDs use, notwithstanding TIRN's conjectures to the contrary. In fact, between the issuance of the April 19, 1996,

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[17] "This court has not and cannot lawfully order the Executive to comply with terms of a statute that impinges upon power exclusively granted to the Executive Branch under the Constitution." Earth Island Institute v. Christopher, 6 F.3d at 653.

Guidelines and the October 8, 1996, ruling striking them down, four nations adopted nationwide TEDs programs for the first time (Costa Rica, Ecuador, El Salvador, and Guatemala). Five nations maintained existing nationwide TEDs programs (Belize, Guyana, Indonesia, Trinidad and Tobago, and Venezuela), and another four extended existing nationwide TEDs programs to cover their Pacific coasts for the first time (Colombia, Mexico, Nicaragua and Panama). See *supra,* 16-20.

Similarly, with respect to the only two nations (Brazil and Australia) that have ever exported shipments of TED-caught shrimp to the United States under the Guidelines, the evidence does not support TIRN's assertion (Br. 44-45) that, if the CIT's interpretation were implemented, TEDs would be fully used in all shrimp fisheries. In the case of Australia, its federal government informed State that the 1998 Guidelines did create incentive for the Australian federal government to require TEDs in the enormous Northern Prawn Fishery in April 2000. JA 923. However, because, as a result of internal political divisions, the Australian federal government does not regulate other shrimp fisheries in Australia, it does not have the authority to broaden its TEDs requirement. JA 922-3. The Australian federal government would thus have no incentive to use TEDs in its Northern Prawn Fishery were the United States to embargo all shrimp from Australia as an uncertified nation. JA 923. So, too, if State cannot allow individual shipments of

shrimp into the United States, then individual shrimpers in any uncertified countries will have little incentive to adopt turtle-safe shrimping methods.

Brazil, as the CIT noted, already has a comparable nation-wide regulatory program in place currently, even under the current policy, and has accordingly been certified. In some years, Brazil fails to qualify for certification because of "inadequate enforcement of its TEDs rules in its southern fishery." 110 F. Supp. 2d at 1019. While arguable that Brazil might try harder to enforce its rules if it could not otherwise export shrimp to the United States, there is no evidence in support of this assertion. There is evidence, however, that Brazil has taken steps toward recertification, having recently ratified the Inter-American Convention for the Protection and Conservation of Sea Turtles, which requires comprehensive use of TEDs. JA 921-2.

Both the CIT and TIRN highlight (Br. 45) a July 1998 statement from the National Marine Fisheries Service (NMFS), a division of the Commerce Department, which sets forth that agency's opinion that a "shipment-by-shipment approach will also create enforcement problems. It will be extremely difficult to verify that shrimp being imported as TED-caught from uncertified nations were actually harvested by a trawler using a TED." JA 97; 110 F. Supp. 2d at 1078. This statement does not reflect the opinion of the agency charged with implementing

the statute. 1998 Guidelines, 63 Fed. Reg. 46094; Delegation of Authority Regarding Certification of Countries Exporting Shrimp to the United States, 56 Fed. Reg. 357 (Dec. 19, 1990).

In any event, State considered and addressed NMFS' concerns in the 1998 Guidelines. For instance, State committed to reviewing the procedures uncertified nations use for verifying accuracy of the DSP-121 forms, and, if those procedures are inadequate, to instruct Customs not to permit the importation of TED-caught shrimp harvested in that nation. 63 Fed. Reg. 46095.

Furthermore, even though the evidence to date actually contradicts the theoretical argument that the current approach removes incentives for nations to seek certification, State also committed to reviewing and possibly revising its Guidelines in three years, to determine whether evidence shows that the agency's decision "adversely affected sea turtle species, *e.g.*, by prompting foreign governments to abandon or limit country-wide TEDs programs or to fail to adopt such programs." *Id.* NMFS did not comment after the 1998 regulations issued.

Because State is the agency charged with administering the statute, and because State's interpretation not only addressed NMFS' concerns but also adhered to the plain language of the statute while minimizing conflict with international laws, State's implementation of Section 609 deserves deference. An administering

agency enjoys a presumption of regularity and correctness when implementing a statute. This presumption applies with greatest force when agencies are required to make predictions on topics germane to their area of expertise. See, *e.g.*, Franklin Savings Association v. Office of Thrift Supervision, 934 F.2d 1127 (10th Cir. 1991), cert. denied, 503 U.S. 937 (1992); accord, Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971). Once this presumption was established, TIRN bore the burden of presenting facts contradicting the presumption. Environmental Defense Fund, Inc. v. Costle, 657 F.2d 275, 283 n.28 (D.C. Cir. 1981); Bagdonas v. United States, 884 F. Supp. 1194, 1198 (N.D. Ill 1995), aff'd, 93 F.2d 422 (7th Cir. 1996). The CIT found that TIRN provided little evidence to rebut the State's predictive judgment. Accordingly, it was error for the court to substitute its judgment for State's in the absence of persuasive contradictory evidence.

## II

## THE CIT POSSESSED THE EQUITABLE DISCRETION TO DENY TIRN'S REQUESTED RELIEF

The CIT denied TIRN's requested relief,[18/] finding that the evidence TIRN produced as to sea turtle mortality in Brazilian waters was insufficient to support

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18/ In addition to requesting that the CIT declare the 1998 Guidelines illegal, TIRN sought remand of the Guidelines to State for further consideration and an injunction preventing the importation of shrimp from uncertified nations. JA 195-6.

issuance of an injunction. 110 F. Supp. 2d at 1019 -1020. The proffered evidence itself indicated that it did not contain reliable evidence as to numbers of captured sea turtles in Brazilian waters, much less demonstrate sea turtle mortality attributable to the 1998 Guidelines. *Id.* Moreover, because only two uncertified nations export TED-caught shrimp to the United States, the potential for injury to sea turtles as a result of implementing the 1998 Guidelines is limited. The CIT properly refused to assume irreparable injury. *Id.*

TIRN appeals the CIT's denial of TIRN's requested remedy, arguing (Br. 29-41) that (1) the CIT lacked discretion under the APA not to set aside the 1998 Guidelines, or to allow State to continue to permit TED-caught shrimp from uncertified nations to enter this country; and (2) the CIT was required by the ESA to enjoin the import of TED-caught shrimp from uncertified nations.

This Court need not reach TIRN's arguments, however. If the Court reverses the CIT's merits determination, it will not need to address remedy. Should the Court affirm the CIT on the merits, the government will comply with a final judicial interpretation of the scope of the embargo. In essence, therefore, this issue is a complicated, *post hoc* analysis of whether an injunction pending appeal should have issued, and need not be reached.

Moreover, TIRN is simply wrong that the relevant statutes and case law deprived the CIT of its equitable discretion, as we next show.

**A. The APA Does Not Deprive Courts of Their Equitable Discretion.** -- TIRN asserts (Br. 31) that the APA requires reviewing courts to vacate agency action found to be not in accordance with law, citing 5 U.S.C. 706(2). It is, of course, beyond dispute that courts retain their equitable discretion unless affirmatively foreclosed: "[u]nless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied.'" Weinberger v. Romero-Barcelo, 456 U.S. 305, 313 (1982). Moreover, there is ample precedent under the APA for courts to find a regulation invalid but keep it in effect pending further proceedings.

The D.C. Circuit, with extensive expertise in reviewing federal regulations, regularly remands a regulation without vacation. When unable to ascertain the rationale behind a rule, or where the rulemaking is procedurally defective, for example, the D.C. Circuit will remand without vacating for further explanation or process. See generally, Checkosky v. SEC, 23 F.3d 452 (D.C. Cir. 1994); A.L. Pharma, Inc. v. Shalala, 62 F.3d 1484, 1492 (D.C. Cir. 1995); BB&L, Inc. v.

NLRB, 52 F.3d 366, 372-73 (D.C. Cir. 1995) (Tatel, J. concurring in part and dissenting in part).

More relevant to this case are instances where a court finds the agency's rationale to be arbitrary and capricious, yet wishes to minimize disruption by letting the regulation stand while the agency remedies its action. See Independent U.S. Tankers Owners Committee v. Dole, 809 F.2d 847, 855 (D.C. Cir.), cert. denied, 484 U.S. 819 (1987); see also Ronald M. Levin, *"Vacation" at Sea: Judicial Remands and the APA*, 21-SPF Admin & Reg. L. News 4, (discussing procedure of remand without vacating). Here, given the history of this case, with at least seven published trial court opinions and two published court of appeals decisions already, and in light of the lack of compelling evidence as to irreparable injury, the CIT could reasonably have concluded that the better course would be to refrain from enjoining the regulation pending judicial review. The United States has already been required to change the scope of its embargo twice as a result of litigation, with real and dramatic impacts on other nations and on the shrimping industry. Indeed, one direct result of instituting the CIT-mandated embargo against all uncertified nations was a successful international challenge to the United State's implementation of Section 609. In its opinions on review here, the CIT was well aware of the international impacts of its decisions, reviewing in detail both the

extensive efforts the government has made to implement Section 609 and the status of international relations. The CIT's determination not to vacate the 1998 Guidelines was thus prudent, given the international implications, and the fact that TIRN could reapply to the CIT for further injunctive relief, upon development of further information indicating harm to sea turtles as a result of implementing Section 609.

An analogous route to avoiding disruption (and one which the CIT could readily have taken), would have been to enjoin the 1998 Guidelines and stay the injunction pending appeal. See, *e.g.*, Wyoming Farm Bureau Federation v. Babbitt, 987 F. Supp. 1349 (D. Wyo. 1997). This would have achieved the same result of allowing the regulation to remain in place pending appeal. It is significant, moreover, that TIRN did not apply to either court for an injunction pending appeal, perhaps tacitly recognizing the limited legal importance of the remedy issue, and the significant practical international implications.

TIRN also asserts (Br. 35) that APA Section 706(1) requires courts to compel agency action that has been "unlawfully withheld or unreasonably delayed." This APA provision does not apply, because this is a challenge to a final agency action, the 1998 Guidelines, reviewable under Section 706(2). Given the equities as discussed above and below, TIRN's Section 706(1) argument is simply inapposite.

B. **The CIT Acted Within its Equitable Discretion in Denying Injunctive Relief.** -- TIRN also argues (Br. 37) that the CIT lacked any discretion to deny injunctive relief because Section 609 is allegedly a "part of" the ESA, and therefore was *required* to issue an injunction. This argument is wrong.

1. **Section 609 is Not Part of the Endangered Species Act.** -- Section 609 was originally enacted as an appropriations rider to the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriation Act of 1990, Pub. L. 101-162, 103 Stat. 988 (Nov. 21, 1989), and not as "part of" the ESA, as held by the CIT. 110 F. Supp. 2d at 1015. This Court has already expressed scepticism as to that assertion, without definitively ruling on it,[19/] when it denied fees under the ESA. In its prior, vacated decision, however, which provided reasoning for its conclusion that Section 609 is part of, or supplements, the ESA, the CIT erroneously assumed that "Congress chose to codify that section [609] as a note to 16 U.S.C. 1537." 942 F. Supp. at 606.

Codification of statutes is a function of the Office of Law Revision Counsel (OLRC), a unit of the House of Representatives charged with compiling the United States Code. The OLRC exercises editorial discretion in organizing the permanent

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[19/] "Even hypothetically assuming that section 609 falls within the ESA * * *;" "Even if section 609 were a part of the ESA * * *," 147 F.3d at 1357.

statutes of the United States in a rational and accessible format. See 2 U.S.C. 285b. While certain U.S.C. titles are legislatively considered and enacted by Congress into positive law, see 1 U.S.C. 204(a), codifications not enacted into positive law have neither been considered and approved by Congress nor presented to the President. Title 16, in which the ESA and Section 609 appear, has not been so enacted. See 1 U.S.C. 204, Table.

The OLRC made the editorial decision to group Section 609 with Section 1537. While that grouping is not unnatural (both enactments address sea turtle regulation), there is no indication that Congress intended Pub. L. 101-162 as an amendment or supplement to the ESA. Indeed, its inclusion by the OLRC as a note in Title 16, rather than an amendment, underscores that point. Courts may not infer congressional intent from the location of a statute in the Code nor the organization of statutory provisions contained therein. See United States v. Welden, 377 U.S. 95, 98 n.4 (1964) (Supreme Court refused to give weight to the placement of an appropriations bill proviso where the codification "has not been enacted into positive law."); Warner v. Goltra, 293 U.S. 155, 161 (1934); see also Murrell v. W. U. Tel. Co., 160 F.2d 787 (5th Cir. 1947).

In addition, as this Court has held, challenges to implementation of Section 609(b) are properly APA suits, not ESA citizen suits. Because Section 609

provides for an embargo, it is governed by jurisdictional provisions other than the ESA citizen suit provision, 16 U.S.C. 1540(g)(3)(A). Section 1540(g)(3)(A) provides that citizen suits under ESA "may be brought in the judicial district in which the violation occurs," while Section 609(b) places jurisdiction exclusively in the CIT. See Earth Island Institute v. Christopher, 6 F.3d 648 (9th Cir. 1993). In fact, Earth Island originally filed suit in the CIT because its action "arises out of [a] law of the United States [Section 609] providing for embargoes * * * on the importation of merchandise for reasons other than the protection of health or safety." 28 U.S.C. 1581(i). This distinction highlights the basic fact that a suit under the Section 609(b) embargo law is not an ESA citizen suit and counsels against reading these two statutes in *pari materia*.

2. **An Injunction is Not Mandated in All Cases.** -- Even where a statutory violation is established, "[t]he grant of jurisdiction to ensure compliance with a statute hardly suggests an absolute duty to do so under any and all circumstances, and a federal judge sitting as chancellor is not mechanically obligated to grant an injunction for every violation of law." Romero-Barcelo, 456 U.S. at 313. Thus, "an injunction is an equitable remedy that does not issue as of course." Amoco Prod. Co. v. Village of Gambell, 480 U.S. 531, 542 (1987); Friends of the Earth v. Laidlaw, 528 U.S. 167, 192-3 (2000). Moreover, the courts are still obliged to

consider where the public interest lies in deciding whether to grant or deny injunctive relief. American Motorcyclist Ass'n v. Watt, 714 F.2d 962, 965 (9th Cir. 1983).

In Gambell, the Supreme Court concluded that in granting injunctive relief, the appellate court, like the appellate court in Romero-Barcelo, erroneously focused on the statutory procedure rather than on the underlying substantive policy the process was designed to effect. 480 U.S. at 544. Here, TIRN seeks to require the CIT to focus exclusively on sea turtle protection to the exclusion of other effects of the enactment. Consistent with the decisions in Romero-Barcelo and Gambell, however, the CIT could properly have focused on whether the grant of such injunction would prevent alleged irreparable injury to sea turtles species while properly respecting the international ramifications of the enactment. This is the appropriate analysis for a stay pending appeal which would clearly be justified in this case.

In sum, because Section 609 is not part of the ESA and because case law does not so mandate, the instant case is not one in which the CIT lacked discretion to deny an injunction.

## III

## THE CIT REASONABLY DENIED ATTORNEYS FEES

The CIT ruled that attorneys fees were not appropriate in this case, finding that, "given the facts and circumstances of this case, which obviously transcend purely domestic concerns, [it was] unable to conclude that the government's position is not substantially justified." 110 F. Supp.2d at 1019. This decision is reasonable and not an abuse of discretion for several reasons.

**A. Statutory Requirements and Standard of Review.** -- In relevant part, EAJA provides as follows:

> Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

28 U.S.C. 2412(d)(1)(A),(B) (emphasis added).

"EAJA is not a mandatory fee-shifting device." RAMCOR Services Group, Inc. v. United States, 185 F.3d 1286, 1290 (Fed. Cir. 1999) (citing Gavette v. Office of Personnel Management & Dep't of the Treasury, 808 F.2d 1456, 1465 (Fed. Cir. 1986)). Regardless of the outcome, a court entertaining an EAJA application must

determine whether the Government's "litigating position had a 'reasonable basis in law and fact.'" *Id.* (quoting Pierce v. Underwood, 487 U.S. 552, 566 (1988)). This determination requires the trial court to "'look at the entirety of the government's conduct and make a judgment call whether the government's overall position had a reasonable basis in both law and fact.'" *Id.* (quoting Chiu v. United States, 948 F.2d 711, 715 (Fed. Cir. 1991)).

"Because the Act exposes the government to liability for attorney fees and expenses to which it would not otherwise be subjected, it is a waiver of sovereign immunity." Wilson v. General Services Administration, 126 F.3d 1406, 1408 (Fed. Cir. 1997) (citing Ardestani v. INS, 502 U.S. 129, 137 (1991)). "As such, it 'must be strictly construed in favor of the United States.'" *Id.* (quoting Ardestani, 502 U.S. at 137).

A denial of fees under EAJA is reviewed for abuse of discretion. PPG Industries, Inc. v. Celanese Polymer Specialties Co., 840 F.2d 1565, 1567 (Fed. Cir. 1988).[20/] As demonstrated, however, the CIT's merits judgment is predicated upon

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[20/] TIRN's brief confusingly mentions several standards of review of the denial of fees, claiming variously that the CIT "committed a manifest error of law" (Br. 3), indicating legal error, (Br. 3) and that the court's ruling was "clearly erroneous" (Br. 48), the standard normally applicable to factual error. While TIRN would like this Court to find a legal error in applying an inappropriate standard (Br. 41-42), TIRN (continued...)

a legal error. If this Court reverses the merits determination, TIRN will not be a prevailing party in any respect in this litigation, [21/] and this Court would not need to reach this fee issue. Even if the CIT is upheld, however, the government's position is substantially justified and fees were properly denied.

**B. The CIT Reasonably Found that the Government's Position was Substantially Justified.** -- Even if this Court rejects our statutory interpretation, it should agree that the government's position is substantially justified. A governmental position is substantially justified if it is "justified to a degree that could satisfy a reasonable person."" Pierce, 487 U.S. at 565. "'[S]ubstantial justification' requires that the Government show that it was clearly reasonable in asserting its position, including its position at the agency level, in view of the law and the facts." Gavette, 808 F.2d at 1467. In other words, "[t]he Government must show that it has not 'persisted in pressing a tenuous factual or legal position, albeit one not wholly without foundation.'" *Id.* (citation omitted). EAJA "attorney's fees and other expenses are generally awarded only where the government offers no

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[20/](...continued)
ultimately concurs that the standard of review is one of abuse of discretion. Br. 42.

[21/] TIRN's lengthy recitation at Br. 43-47 of the history of this litigation neglects to mention that TIRN's predecessor has already received full payment of those EAJA fees to which, pursuant to settlement, it agreed it was entitled for success on issues (not including the merits herein) litigated prior to this proceeding.

plausible defense, explanation, or substantiation for its action." Ferro Union, Inc. v. United States, 1999 WL 1331324 at *3 (CIT Dec. 30, 1999) (citation and internal quotation marks omitted). Applying these standards, the CIT reasonably found that the government's position was substantially justified.

First, in arguing that the embargo covers only certain categories of shrimp, the government was construing statutory terms that had not previously been ruled on by any court (the CIT's prior ruling on these terms having been vacated). Moreover, the government's construction of Section 609 logically flows from a construction of the statute previously adopted by the court. Prior to the adoption of the 1998 Guidelines, the CIT recognized that wild-caught shrimp harvested in cold and fresh water, wild-caught shrimp harvested with gear that does not harm sea turtles (such as artisanal gear), and shrimp harvested in aquaculture facilities are not subject to import prohibition, even if the harvesting nation is not certified pursuant to subsection (b)(2) of Section 609. Earth Island Institute v. Christopher, 948 F. Supp. 1062, 1069 (CIT 1996), vacated, 147 F.3d 1352 (Fed. Cir. 1998). As with these other means, the harvesting of shrimp using TEDs does not adversely affect sea turtle species.

Moreover, the government should attempt to comply with international obligations, where not inconsistent with domestic laws. See Footwear Distributors

and Retailers of America v. United States, 852 F. Supp. 1078, 1088 (CIT 1994), appeal dismissed, 43 F.3d 1486 (Fed. Cir. 1994). Here, while agreeing that Section 609 is covered by an exception to WTO rules for measures relating to the conservation of exhaustible natural resources, the WTO Appellate Body found that the United States' application of Section 609 resulted in unjustifiable discrimination because "shrimp caught using methods identical to those employed in the United States have been excluded from the United States market solely because they have been caught in waters of countries that have not been certified by the United States." United States – Import Prohibition Of Certain Shrimp And Shrimp Products, WT/DS58/AB/R, at ¶ 165 (Oct. 12, 1998), 1998 WL 720123 (W.T.O.). The 1998 Guidelines resolved a concern raised by the Appellate Body, while adhering to the language of Section 609.

Finally, "'[t]he mere fact that the United States lost the case does not show that its position in defending the case was not substantially justified.'" Luciano Pisoni Fabbrica Accessori Instrumenti Musicali v. United States, 837 F.2d 465, 467 (Fed. Cir.), cert. denied, 488 U.S. 819 (1988) (quoting Broad Ave. Laundry & Tailoring v. United States, 693 F.2d 1387, 1391 (Fed. Cir. 1982)). The government has amply demonstrated that the 1998 Guidelines are well founded in reason and

practicality, and the CIT therefore reasonably concluded that the government's position was substantially justified.[22/]

C. **TIRN's Arguments to the Contrary are Without Foundation.** -- TIRN claims (Br. 48) that the CIT's ruling was "clearly erroneous," apparently because the court (1) incorrectly shifted the burden of proof and (2) assumed that it was sufficient that the State Department was substantially justified not with existing law but with "an alternate policy which Defendants apparently favor, but which Congress rejected." *Id.*

TIRN is simply wrong that the CIT improperly shifted the burden of proof. In its July 19, 2000, decision, the CIT placed the burden for proving that its position was substantially justified on the federal government, quoting (110 F. Supp. 2d at 1019) at length from Gavette, 808 F.2d at 1467: "'[S]ubstantial justification' requires that the "Government show that it was clearly reasonable in asserting its

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22/ TIRN has previously argued that Pirus v. Bowen, 869 F.2d 536 (9th Cir. 1989), stands for the proposition that, where an agency's conduct involves regulations that plainly contradict the governing law, the Government's position is not substantially justified. Turtle Island, however, misconstrues Pirus. There, while the district court held that "the federal agency's regulations 'embodied a forced statutory construction, which could not be reconciled with * * * the plain terms of the section' or the legislative history" (*id.*), the Ninth Circuit stated that "[w]ere we deciding whether the government's position was 'substantially justified,' we might be inclined to reach a different result from that reached by the district court." Pirus, 869 F.2d at 540.

position * * * . The Government must show * * *. It is not sufficient for the Government to show merely 'the existence of a colorable legal basis for the government's case.'"

The only apparent basis for TIRN's claim that the CIT improperly shifted the burden to TIRN is the summary statement at the end of the opinion that, "while the plaintiffs have persuaded this court to grant declaratory relief, they have not borne their burden with regard to any other relief for which they pray." 110 F. Supp. 2d at 1020. This conclusory sentence follows, and would appear to refer back to, the court's analysis of TIRN's request for injunctive relief, in which the CIT expressed its view that plaintiffs had failed adequately to prosecute their case.

TIRN again confuses the CIT's analysis of the request for injunctive relief with the analysis of substantial justification when claiming (Br. 42, see also Br. 48) that the CIT erroneously required it to "demonstrate the wisdom of Congress' policy choices in enacting the law in question," thereby "creat[ing] hurdles to the recovery of fees never contemplated by Congress or any court." TIRN quotes (Br. 48) from that portion of the decision (Section "III") that discusses TIRN's attempted showing that the government should be enjoined, where the CIT described the paucity of evidence as to irreparable injury: "[P]laintiffs have not proven that this goal [of helping to prevent global extinction of sea turtles] is being drowned not by vessel-

specific shipments of shrimp from Brazil (or any other uncertified nation)" (110 F. Supp. 2d at 1019). In sum, TIRN stretches in its brief to create a legal argument to bolster its claim for fees when, in fact, the CIT was reasonable and did not abuse its discretion in denying them.

## CONCLUSION

For the foregoing reasons, the CIT's judgment should be reversed on the merits, and upheld with respect to the court's decision to deny the requested injunctive relief and attorneys fees.

Respectfully submitted,


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